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FOREIGN LAWYERS IN JAPAN: A GROWING U.S. EXPORT

Summary

For 75 years prior to 1955 Japanese law permitted foreign lawyers to ply their craft in Japan but prohibited court-related activities. Formidable barriers to foreign lawyers were in place from 1955 to 1987, when new legislation authorized a restricted foreign presence. Since then about 100 foreign lawyers have received permission for a limited practice in Japan. The removal or softening of some of the restrictions governing foreign lawyers is a concern of the Office of U.S. Trade Representative because it considers ease of access to foreign lawyers in Japan to be a key means of facilitating complex international business transactions. The present restrictions create an asymmetrical situation, USTR officials believe; Japanese companies selling or investing in the United States have easy access to expert advice, but their U.S. counterparts do not have similar opportunities in Japan. The aim of the current negotiations is to redress these asymmetries.

Foreign Lawyers and Regulation of the Legal Sector

Negotiations to open the Japanese legal sector, which have been ongoing since the early 1980s, have been especially difficult. One reason is that they confront the Japanese notion of law and the role of lawyers. A more mundane explanation is that changes in the scope of foreign lawyers practicing in Japan could endanger the entrenched interests of Japanese lawyers; they have been granted a partial monopoly over a narrowly defined area of legal practice -- litigation and court-related activities. Restrictions on foreign lawyers are part of the regulatory framework controlling the more general practice of law.

But regulation is not an isolated activity. The structure of regulation itself is determined by a rough balance among the conflicting desires of those who stand to gain and lose from the power of the state to restrict behavior and transfer wealth. Since the Meiji Restoration and the evolution of the Japanese legal system, those balances have shifted. The role of the foreign lawyer likewise has changed.

The same laws that have defined the practice of domestic lawyers in Japan regulate foreign lawyers there, too. Legislation in 1893 established the first framework for lawyers following adoption of the 1889 Meiji Constitution. This law coined the term bengoshi for the Japanese practitioner, a translation of the English title "barrister." Until now bengoshi primarily have performed the role of a trial lawyer; the monopoly extended to members of the profession assign to bengoshi exclusive rights to provide legal assistance to parties in formal court proceedings or in actions that could crystallize into a court case. The 1893 statute permitted foreign lawyers to handle all other kinds of legal affairs as well as court proceedings related to cases involving aliens and international transactions.[1]

The authority permitting foreign lawyers to provide commercial counseling outside the areas reserved for bengoshi was undisputed. Major revisions to what is known as the Bengoshi Law in 1933 and 1949 altered only slightly the provisions affecting foreign lawyers. The 1949 law, drafted during the American occupation, permitted foreigners to be recognized and admitted as bengoshi if they could pass the required examinations on Japanese law; it also licensed foreign lawyers in a category limited to cases involving aliens and foreign law. Under the 1949 licensing procedures 68 foreign lawyers -- mostly American -- were admitted to practice, but only two passed the examination on Japanese law. According to some experts, the formal granting of licenses did not expand or contract the permitted areas of practice but rather altered the process of application and approval.

Starting in the 1950s some Japanese international lawyers contended that the 1949 provisions were demanded by the occupation authorities and were a sharp break with the past.[2] Most legal scholars, however, rebut this view and argue that the postwar legislation merely continued on the main lines that had begun even before the Meiji Constitution.[3] Then in 1955 the Diet repealed the articles in the Bengoshi Law that permitted the licensing of foreign lawyers; those who had been admitted previously were allowed to continue to practice under a grandfather clause as jun-kaiin, or "quasi-members" of the bar.

[1]John O. Haley, "Redefining the Scope of Practice Under Japan's New Regime for Regulating Foreign Lawyers," Law in Japan, XXI, 1988, p. 21.

[2]An example of this view is in Keiichi Tadaki, "The Gaikokuho Jimu Bengoshi System: Circumstances of Acceptance and Scope of Practice," Law in Japan, XXI, 1988, pp. 122-123.

[3]Haley, op. cit., p. 21.

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Nichibenren (Japan Federation of Bar Associations) campaigned to further prevent foreigners from being able to give legal advice that fell outside the already controlled and narrow scope of court cases and litigation. The organization interpreted the 1955 legislative changes as prohibiting all legal advice by foreigners, partly on the grounds that all matters, at some future time, may become the subject of litigation. In 1973 Nichibenren issued a set of standards that urged an expansion of the kinds of activities reserved for bengoshi; among these were legal counseling and other activities unrelated to trial practice. These standards also characterized all foreigners not admitted to the Japanese bar as "unqualified aliens."[4] Convinced to adopt the policy implicit in the Nichibenren standards, the government cooperated by denying or restricting visas to American attorneys traveling to Japan in the mid-1970s for business purposes.

The Bengoshi Law, however, was not the only potential gateway for American lawyers. The Treaty of Friendship, Commerce and Navigation between the United States and Japan, which became effective in 1953, permitted several kinds of legal activities. First, U.S. individuals and companies received national treatment in Japan, meaning they could perform services that Japanese citizens who are not bengoshi may perform. Actions that would not violate the Bengoshi Law, for example, included business and financial consulting or the preparation of contracts. Second, Article VIII of the treaty stated that U.S. companies and individuals in connection with the operation of their enterprises and those in which they have a financial interest shall be permitted to engage ". . . attorneys, agents, and other specialists of their choice . . . regardless of the extent to which they may have qualified for the practice of a profession within the territory of Japan. . . ." Such attorneys or specialists, however, could not become involved in court cases or other activities clearly reserved to members of the bar. Although the author of the foreign lawyer sections of the Bengoshi Law supported the U.S. interpretation of the treaty in numerous law journal articles, the Ministry of Foreign Affairs continued to refuse to issue visas to American attorneys until the issue was resolved in the mid-1980s.

Article VIII also barred nationality as a requirement for practicing a profession if an applicant met all the qualifications applicable to nationals; Japanese would be treated similarly in the United States under the treaty's reciprocity provisions. The Senate, however, ratified the treaty without the reciprocity clause because it wanted to maintain nationality restrictions on lawyers in the United States. Diet members subsequently attempted to close off the unreciprocated rights of Americans in Japan; some have argued that the 1955 amendment barring foreign lawyers was at least in part a response to the reciprocity issue.[5]

U.S. nationality requirements collapsed, however, in a 1973 Supreme Court ruling that such requirements infringed the 14th Amendment of the U.S.

[4]"Standards Concerning the Prevention of Non Attorney Activities by Foreigners, 1972," quoted in Tadao Fukuhara, "The Status of Foreign Lawyers in Japan," The Japanese Annual of International Law, No. 17, 1973, p. 36.

[5]Tadaki, op. cit., p. 124.

Constitution.[6] A substantial number of foreigners, including Japanese, subsequently qualified to practice in the United States by passing state bar examinations. In addition, New York state adopted liberalized rules in 1974 for licensing foreign lawyers as legal consultants in foreign law without examination. This shift in the weight of reciprocity made Japan the lagging partner of the treaty.

By the mid-1970s the explosive growth of Japanese trade resulted in a growing demand for international legal skills and increased foreign attention to the tightening restrictions on foreign lawyers. U.S. law firms attempting to service their international clients found themselves increasingly hampered in their ability to operate in Tokyo. Visa restrictions, formal Nichibenren complaints against foreign lawyers' activities plus informal pressures on Japanese lawyers who cooperated with foreign lawyers made the situation ripe for converting a legalistic quarrel into an international dispute. A small group of American lawyers in international practice urged the U.S. government to become involved formally and directly in removing or reducing Japan's restrictions on their activities. The target of their attention was a complex legal framework influenced by and protective of Nichibenren members.

Structure of Legal Practice

The relatively small number of lawyers in Japan results entirely from government regulation, with strong support from Nichibenren. Undergraduate law faculties in the major universities annually graduate more than 30,000 students. These graduates can enter the management ranks of corporate or government bureaucracies, apply their legal expertise by joining the legal departments of major companies, or take the bar examination -- the first step toward qualification as a bengoshi.

Since 1970 more than 20,000 applicants have taken the national law examination each year; applications reached a peak of about 30,000 in the late 1970s (see Table 1). Of these, only about 500 have been permitted to pass and enter the two-year full scholarship program of the Legal Training and Research Institute, administered by the Supreme Court and the only law school authorized to train bengoshi. The 2 percent success rate stands in sharp contrast to the 66 percent who pass a bar exam in the United States.[7] Moreover, the average age of people passing the Japanese exam has been rising for the past 15 years; in 1990 the average was 28-plus. This indicates applicants spend about six or seven years at cram schools, often after repeated attempts at taking the examination. For those who do not pass, and even for those who pass after repeated tries, this represents substantial investments in lost time and forgone income.

The number of people permitted to enter the Legal Training and Research Institute bears little relation to notions of supply and demand; the level has been set administratively since around 1965. Training focuses almost solely on the development of trial skills. Graduates include not only those who become bengoshi but also future judges and public prosecutors.

[6]In re Griffiths, 413 U.S. 717 (1973).

[7]Arthur J. Alexander and Hong W. Tan, Case Studies of U.S. Service Trade in Japan (Santa Monica, California: Rand Corp., September 1984), p. 57.

Table 1: Persons Taking and Passing Japanese National Legal Examinations, 1950-90

Year	Number of Applicants	Number Passing	Percentage Passing	Percentage First-Time Passers*
1950	2,806	260	9.3%	17.8%
1955	6,347	250	3.9	22.7
1960	8,363	366	4.4	18.4
1965	13,644	563	4.1	18.5
1970	20,160	519	2.6	10.4
1975	27,791	482	1.7	6.9
1980	28,656	545	1.9	4.1
1985	23,855	482	2.0	3.3
1986	23,904	538	2.3	n.a.
1987	24,690	526	2.1	n.a.
1988	23,352	535	2.3	n.a.
1989	23,202	523	2.3	n.a.
1990	22,900	506	2.2	n.a.

*Percentage of first-time passes includes people 22 years or younger.

Source: Ministry of Justice, Statistics Concerning the Legal Examination, 1990.

With the growth in the size and the complexity of Japanese society, Ministry of Justice officials in charge of personnel matters have been concerned about a growing paucity of trained legal personnel and a shrinking number of candidates wishing to be judges. Accordingly, MOJ increased the number of applicants to the institute to 600 in 1991 and proposed that 700 be accepted in 1993, with perhaps additional increases in the future.[8]

Part of the Justice Ministry's concerns stems from the number of Japanese lawyers moving into the field of international law and away from the more traditional areas of litigation (see below). The Tokyo pages of the Martindale-Hubbell Law Directory, for example, provide an imperfect but useful measure of the growing number of Japanese lawyers specializing in the international field. The English-language directory is comprised of entries paid for by the listed firms; it is aimed primarily at the international community. Since 1970 the number of international legal specialists has grown more than fivefold (see Table 2). Roughly 10 percent of the lawyers in the Tokyo area are engaged in international law.

After completing the course at the training institute, the successful graduate must join one of the regional bar associations before being allowed to practice. The bar is an autonomous body authorized by law to license and supervise the bengoshi community. Because of its independence and authority, Nichibenren has a great deal of persuasive and coercive power over its members and the Ministry of Justice.

[8]"Reform Eyed to Up Bar Exam Success," The Japan Times, February 5, 1991, p. 2.

Table 2: International Lawyers and Law Firms in Tokyo, 1966-90

Year	Number of Firms	Number of Lawyers*
1966	15	103
1970	17	130
1974	24	187
1978	37	274
1982	47	334
1990	76	685

*Excludes patent attorneys, legal counsel and foreigners who are not members of the Japanese bar.

Source: Martindale-Hubbell Law Directory

The kind of work performed by the international specialist stands in sharp contrast to that of the traditional bengoshi. Lawyers outside of Tokyo spend about 85 percent of their time on civil court cases; the average Tokyo practice is a little lower at 75 percent. Non-Tokyo and Tokyo lawyers spend only 5 percent and 10 percent of their time, respectively, on nondispute-related matters. As bengoshi gain seniority and experience, they focus an even greater share of their time and energy on court-related work; more than 80 percent of this work, even in Tokyo, is for individuals or small and medium-sized businesses.[9] The traditional practice of a Japanese lawyer, therefore, is quite different from the commercial advice and complex transactions handled by Japanese lawyers specializing in international matters and their active, problem-solving approach to client interests.

The traditional bengoshi also has a different orientation toward the law than the typical American lawyer or international legal specialist. A bengoshi often feels a greater sense of obligation toward society as a whole than to the narrow interests of his clients. Japanese bengoshi, American lawyers in Tokyo, Justice Ministry officials and foreign business executives in Japan all have raised these differences in legal orientation as impediments toward greater liberalization. One analyst underlined the importance of such differences, saying, "[T]he least discussed but most fundamental threat created by the entry of foreign lawyers is the potential for redefinition of the very nature and structure of the Japanese legal profession."[10] Yet a foreign business adviser in Tokyo, while noting particular instances of the traditional bengoshi approach to the law, tellingly observed that "the lack of serious competition among the small number of bengoshi permits them to indulge in this lofty role."[11]

[9]Michael K. Young, "Foreign Lawyers in Japan: A Case Study in Transnational Dispute Resolution and Marginal Reform," Law in Japan, XXI, 1988, p. 102.

[10]Ibid., p. 105.

[11]John E. Perry, Jr., "A Consumer's View of the Market for Legal Services in Japan," Law in Japan, XXI, 1988, p. 180.

These competing, but not necessarily exclusive, views of the Japanese legal situation offer two explanations for Nichibenren's reluctance to allow the entry of more foreign lawyers or a loosening of the restrictions on their practice: (1) preservation of the returns inherent in a monopoly -- including high incomes and the freedom to practice as desired, unperturbed by competitive pressures, and (2) maintenance of an approach to the law that places social welfare above client or personal interests. To assess the validity of these possible explanations it is necessary to determine whether incomes indeed are higher than might be expected in a more competitive environment; in other words, is there something worth protecting?

Incomes of Japanese Lawyers

The prima facie evidence suggests that having bengoshi status is valuable. The fact that thousands of individuals are willing to devote years to studying for the legal examination, taking and retaking it, with barely a 2 percent chance of passing suggests that the returns on this effort warrant the investment. Moreover, the fact that the annual growth rate in the number of lawyers in the international field has averaged about 9 percent over the past 20 years indicates even higher returns to this specialty within the legal field.

A 1987 study estimated the incomes of Tokyo lawyers from income tax information for the years 1964 to 1982. Combining the income data with biographical information from Nichibenren, the study calculated the real incomes of lawyers, taking account of such other factors that affect income as years of experience, education and firm size.[12] Demand for international specialists was linked to the sum of imports and exports; supply was defined as the total number of lawyers in international practice as well as the size of the group entering the specialty the same year as a given lawyer.

The results of these estimates for lawyers in their prime earning years are shown in Table 3 along with the real incomes of other professionals of the same average age. Domestic lawyers' incomes were equivalent to those of their most successful peers in alternative occupations, except for top medical officers. (The results generally were consistent with, but about 25 percent lower than, a Nichibenren income survey for 1979.[13]) Lawyers in international practice did very well indeed, with incomes considerably higher than any of the comparison groups. Their Y26 million average income in 1982 was equivalent to $104,200 at that year's average exchange rate of Y249.08=$1.00. Table 3 also indicates, however, that the real incomes of international specialists had declined quite substantially over the years studied.

These results are consistent with the presence of monopoly returns in international practice and their erosion over the years. They also are

[12]Hong W. Tan and Arthur J. Alexander, Entry Restrictions and Japanese Lawyers' Incomes in International Legal Practice (Santa Monica, California: Rand Corp., May 1987).

[13]Kahei Rokumoto, "The Present State of the Japanese Practicing Attorneys" (unpublished paper, Tokyo University Law faculty, 1984). Mr. Rokumoto did not analyze possible biases from the partial response to the survey; biases usually raise reported incomes.

Table 3: Incomes of Tokyo Lawyers in Domestic and International Practice and Other Professionals*

(real incomes in 1982 terms in thousands of yen)

	1964	1970	1976	1982
Domestic Lawyer	Y6,128	Y10,717	Y8,701	Y6,768
International Lawyer	41,547	29,795	35,055	25,964
Hospital Director	n.a.	n.a.	17,053	18,794
Chief of Medical Department	n.a.	n.a.	9,938	10,928
Head of Research Institute	n.a.	n.a.	6,470	6,883
University Professor	n.a.	n.a.	5,487	6,026

*Age 50 or older.

Source: Nonlawyers income, Japan Statistical Yearbook; lawyers income, Hong W. Tan and Arthur J. Alexander, Entry Restrictions and Japanese Lawyers' Income in International Legal Practice (Santa Monica, California: Rand Corp., May 1987), p. 14.

consistent with the high, but not extraordinary, returns calculated for the study's random sample of Tokyo lawyers in domestic practice. The high inflation-adjusted incomes for international lawyers at the start of the study suggests that with the elimination of competition from foreign lawyers in 1955, the gap between the demand for legal advice on international business and the supply of lawyers able to provide this help initially grew as the foreign activities of Japanese companies expanded at quite rapid rates. This gap created an incentive for domestic lawyers already admitted to the bar to invest in the training and the experience necessary to enter the lucrative international specialty. However, the resulting expansion of Japanese lawyers in the international field then, as would be expected, eroded the high returns since demand did not grow even more rapidly.

Japanese lawyers in international practice turn out to have been the most active lobbyists for maintaining the restrictions on foreign lawyers.[14] Statistically estimated equations in the previously mentioned study found that real incomes fell proportionately with the number of specialists but rose at only half the rate of growth in demand.[15] The downward pressure on incomes from the expansion in the number of practitioners offers a clue to understanding the fervent desire of those already in the international specialty to prevent more lawyers from entering. The latent pool of trained and experienced-foreign lawyers posed a real threat to the high incomes of Japanese specialists, who had seen, as a group, their incomes in the early 1980s plunge from the high disequilibrium returns of an earlier period.

[14]Young, op. cit., p. 104 and Rexford L. Coleman, "Some of the Underlying Politics of the Dispute Involving Foreign Attorneys Under the Japanese Attorney's Law and a Plea for Future Accommodation," Law in Japan, XXI, 1988, pp. 72-73.

[15]Tan and Alexander, op. cit., pp. 25-27.

The only moderately high incomes of lawyers in domestic practice also may explain the drop-off in the number of people taking the bar examination. The rate of return on a legal education for a domestic lawyer was higher in 1978 than for the average college graduate but only if the prospective lawyer took five years or less to pass the legal exams.[16] If a law school applicant spent seven years retaking the tests, the return was barely equal to that of the average graduate. Moreover, the attractiveness of a career in law rapidly diminished as the average time to pass the exam expanded to more than seven years. The practice of international law, however, remained competitive -- even for the seven-year candidate.

That people in domestic legal practice have not earned even higher incomes than those observed above is partly explainable by the large number of legal practitioners who are not bengoshi. As noted earlier, the bengoshi's monopoly extends over a rather restricted area of practice -- actual or potential litigation. Patent attorneys, tax attorneys, legal scriveners, administrative scriveners and the internal legal staff of major companies provide a great deal of the legal advice typically given by lawyers in the United States. As shown in Table 4, the total number of legal workers in Japan is far higher than the usually cited figure, which covers only the small number of bengoshi. Using a definition of lawyer that corresponds more closely with U.S. usage yields a ratio of one legal worker in Japan per 1,100 people instead of the figure of one to 10,000 when just the number of bengoshi are counted. This approach also reduces the contrast with this country, where there is one legal worker per 505 Americans. And it helps account for the modestly high value of domestic law incomes in Japan.

Table 4: Persons Doing Legal Work in Japan, 1982

Occupation	Number
Judges	2,700
Public Prosecutors	1,170
Bengoshi	12,230
Company Legal Staff	1,300-6,000
Judicial Scriveners	14,570
Administrative Scriveners	30,120
Patent Attorneys	2,600
Tax Attorneys	40,860
Total	105,550-110,250
Japanese Population	118,100,000
Population Per Legal Worker	1,071-1,119

Source: Michael Young, "Foreign Lawyers in Japan: A Case Study in Transnational Dispute Resolution and Marginal Reform," Law in Japan, XXI, 1988, p. 116.

[16]Tan and Alexander, op. cit., p. 18.

The Japanese economy has witnessed the deregulation of finance and banking plus a surge in offshore investment and trade since 1982, the cutoff for the previously mentioned study. Have international legal incomes continued to decline with the flow of additional specialists into the field, or has the growth of demand countered the negative forces of expanded supply? A Nichibenren survey of the salaries of new hires in 1990 indicated that the long-term decline noted earlier has been reversed. That means internationally oriented bengoshi have even more to lose today than they did in the 1970s should negotiations succeed in opening Japan's legal market still further.

First-year salaries for international specialists were Y10 million ($74,100 at Y135=$1.00). Domestic law first-year salaries were Y7 million ($51,900). Applying the equations used to adjust the 1964-82 data (including changes in consumer price levels), the starting salary of an international lawyer in 1990 would have been only Y1.7 million ($12,600) if the earlier relationship had remained valid. Evidently something drastic has changed in the past 10 years. Most observers attribute the change to the explosive growth of both outbound and inbound capital flows, a development that the 1987 study's simple demand measure of exports plus imports would have failed to capture.

Pressure from Cultural Views of Law

The preservation of monopoly incomes obviously has shaped Nichibenren's stance on foreign lawyers. What about the other proposed explanation for its position, that the bar association is trying to protect Japanese legal culture? Within the legal community a small number strongly and actively back the traditional bengoshi approach to the law; they have helped international specialists block moves that would threaten the interests of both the average bengoshi and the international specialist. Several American scholars of Japanese law have argued more broadly that the present regime favors all the major players and harms only a more diffuse public with little voice in the debate.

What Japanologists have called the "consensual myth" corresponds to most Japanese accepting as fact such ideas as: litigation is too disruptive, lawyers are especially quarrelsome, and disputes between reasonable people can be settled without courts and lawyers.[17] In summarizing this ideology, commentators inevitably stress the importance to Japanese of preserving harmony and hierarchy. A powerful result is the protection of the Japanese legal system from the incursions of foreigners who would bring with them alien notions of legal ideology and disrupt the existing order. Some scholars go on to observe that these widely shared and deeply held views also promote the narrow interests of the involved parties. For example, the government emphasizes the consensual and nonlitigious nature of Japanese tradition and thereby thwarts challenges to "national, social and economic policies through the courts," and as a result, helps "concentrate power over such policies in the hands of government and business leaders."[18]

[17]J. Mark Ramseyer, "Lawyers, Foreign Lawyers, and Lawyer-Substitutes: the Market for Regulation in Japan," Harvard International Law Journal, XXI, 1986, p. 506.

[18]J. Mark Ramseyer, "Japan's Myth of Nonlitigiousness," The National Law Journal, July 4, 1983, p. 36.

Lawyers benefit from the policies proceeding from this ideology through high incomes and the ability to promote lofty social goals. Businesses are not harmed by the shortage of lawyers and court delays because they have their own legal staffs and both the skilled specialists and the deep pockets to negotiate settlements. Even if some elements within the government would prefer to negotiate access for foreign lawyers, Nichibenren can afford to oppose these views, especially when the bar association's cooperation is needed on other matters -- as in the 1980s when the government was trying to revise the criminal code.

Analysis of Japanese court cases is consistent with the argument that government measures introduced in the 1930s and in the postwar period have capped the level of legal activity in Japan below that seen in many other countries and below that experienced earlier.[19] What is less clear is whether the public-at-large prefers this situation to the alternative of a more law-minded and litigious society. The fact that legal incomes are maintained at high levels may be a consequence of a widely shared ideology as well as something desired by members of the legal profession. In this case the classic strategy of a profession attempting to maintain its preferred status through barriers to entry also is consistent with cultural norms that are promoted actively by important sectors of society.

Rapid changes in the economic environment are likely to have an impact on the legal ideology. The urbanization of society, the consequent decline of social sanctions, the increased complexity and volume of economic transactions as well as the internationalization of business have reduced the forces suppressing litigiousness.[20] Pressures on the legal system from crowded court calendars, lengthy delays and inadequate legal representation add to the forces for change.

Important figures in the Justice Ministry are contemplating policies to modernize the legal system, perhaps more in line with the British approach. In the midst of this yeast-like culture foreign interests are promoting a review of the regulations affecting foreign lawyers. These regulations, however, are part of a larger pattern, the evolving Japanese legal system.

Negotiations: 1974-87

The growth of demand and opportunities in the Japanese market in the 1970s occurred concomitantly with the visa problems and other harassments of foreign lawyers. In response, some of the large, internationally oriented American law firms sought changes in the Japanese situation. Also anxious for change were American trainees in Japanese law firms, young members of the U.S. bar who had gained experience in international law and wished to remain in Tokyo but who saw no route of advancement open to them. The American Bar Association approached Nichibenren in 1974 to open discussions. After eight years of unfruitful meetings the ABA enlisted the support of the U.S. government. Even on a government-to-government basis little movement occurred until mid-1985

19John Owen Haley, "The Myth of the Reluctant Litigant," Journal of Japanese Studies, Summer 1978, p. 372.

20Hideo Tanaka (ed.), The Japanese Legal System (Tokyo: University of Tokyo Press, 1976), p. 263.

when Japan's seventh package of market access initiatives (the Action Program) devoted a brief passage to foreign lawyers, indicating that the Bengoshi Law soon would be amended to resolve problems, such as those outlined by the ABA. Intensive negotiations ensued over the next two years on the details of the required legislation and implementing regulations.[21]

Some American specialists on Japanese law thought reversion to the authority provided under the Friendship Treaty could resolve many of the problems by persuading the Ministry of Foreign Affairs to resume issuing visas in the usual manner. These experts believed that neither Nichibenren nor public prosecutors legally could attack practicing foreign lawyers, provided they did not encroach on the litigation turf clearly reserved for bengoshi. The Friendship Treaty approach, however, was rebuffed by Nichibenren and Japanese negotiators, although it is unclear whether the Office of the U.S. Trade Representative, the lead U.S. agency in the negotiations, fully adopted the rationale as a negotiating option.[22] The strategy of ignoring the Friendship Treaty path drew vigorous criticism after the first round of negotiations. The critics argued that a solution embedded in new legislation predictably would result in Japanese authorities deferring to the more activist international lawyers in the Japanese bar in establishing the terms for admission.[23]

U.S. negotiators continued, however, to seek changes in the law that would establish clearly the right as well as the bounds of foreign legal practice. According to the chief American negotiator, the process was made difficult by the "clash of legal cultures," the weak authority of the Japanese government over Nichibenren (a condition imposed by the American occupation authorities), individual state laws in the United States versus the unified Japanese law, and the absence of sustained high-level attention.[24]

In 1984 Nichibenren had brought to the table a comprehensive proposal for resolving the various issues surrounding foreign lawyers; at the time U.S. international lawyers nixed the terms.[25] Nevertheless, as Japanese and American negotiators hammered out the details of the proposed legislation, both sides essentially adopted Nichibenren's main points. The Diet adopted the compromise proposed in May 1986. Between then and the measure's effective date of April 1, 1987 a second phase of negotiations focused on the implementing rules and regulations. Many of the seemingly onerous restrictions in the law were eased considerably by understandings reached in the subsequent discussions. Remaining problems, however, resurfaced again in 1990 discussions (see below).

[21]Glen S. Fukushima, "The Liberalization of Legal Services in Japan: A U.S. Government Negotiator's Perspective," Law in Japan, XXI, 1988, p. 7.

[22]Fukushima, op. cit., p. 15.

[23]Haley (1989), op. cit., p. 25.

[24]Fukushima, op. cit., pp. 8-9.

[25]Ramseyer (1986), op. cit., pp. 206-207.

The 1986 Foreign Lawyer's Law

The 1986 law defined the scope of foreign lawyers' practice in Japan and imposed certain qualifications and restrictions. Among the major points were:

- The title to be used by the foreign lawyer is gaikokuho jimu bengoshi, roughly translated as "foreign office-work attorney," which is close to the British meaning of "solicitor."

- The basic function of the foreign attorney is to carry out legal business concerning the laws of the country of his or her primary qualification. Because admission to the bar in the United States is on a state-by-state basis and because both governments had agreed to state-by-state reciprocity for American lawyers in Japan, the country of primary qualification was one of the most contentious issues. The agreed outcome was for U.S. lawyers to qualify in Japan according to their state of license and then apply for "designation" for other jurisdictions. An American negotiator has termed approvals of such designations as "virtually automatic."[26]

- Foreign lawyers are prohibited from specific categories of activities. They cannot represent clients in Japanese domestic courts, criminal cases, and lawsuits or administrative proceedings conducted by a foreign court or administrative agency other than those of the country of primary qualification. Neither can a foreign lawyer draw up a "notarial deed" or serve documents (such as a subpoena) for a foreign court or agency or handle cases dealing mainly with real property in Japan.

- Applicants are required to have five years of experience in their home jurisdiction. Some American trainees strenuously objected to this provision because most of their experience had been gained in Japan rather than in the United States. Subsequent interpretations allowed two years of their Japanese experience to count in the five-year requirement, but only if they were employed as trainees at the time the new law went into effect.

- Reciprocity is granted on a state-by-state basis in the case of American lawyers. Eleven American jurisdictions have set the stage for reciprocity by permitting the licensing of foreign legal specialists.

- A bengoshi may employ a licensed foreign lawyer or a trainee, but a foreign lawyer may not hire a bengoshi or operate a partnership with joint distribution of fees. Certain restricted office-sharing arrangements, though, are permitted.

- A foreign lawyer must join a local bar association and submit to its disciplinary jurisdiction.

Various regulations control many other details of practice; for example, they limit the foreign lawyer to a single office and provide detailed guidance regarding the name of the office and even the format and the size of type on signs and business cards. (The individual's name, for example, must come first and be at least as large as the firm's name. A familiar story in Tokyo involves

[26]Fukushima, op. cit., p. 14.

one American firm's bowling team where league shirts were checked by authorities for the proper designation of the firm's name.)

Operating Under the 1986 Law

Within four years of the law's effective date, 98 foreign lawyers had registered in Japan. These included 73 from the United States, 23 from Great Britain, and one each from France and Germany (see Table 5). Among the U.S. registrants were two Japanese citizens who had passed bar examinations in U.S. jurisdictions and who subsequently applied as foreign lawyers in Japan. Of the 98 registered foreign lawyers, 19 have left Japan since their registration.

Table 5: Registered Foreign Lawyers In Japan, April 1991

Home Jurisdiction	Total Number Registered	Left Japan
United States	73	15
New York	42	11
California	18	
Hawaii	2	
Texas	1	
New Jersey	1	
District of Columbia	9	4
United Kingdom	23	4
France	1	
Germany	1	

Source: Ministry of Justice

Most of the remaining foreign lawyers find the existing restrictions more of a nuisance than important prohibitions on their behavior. Such views, however, may be biased because those who would be most affected are unlikely to open offices. In particular, small law firms or solo practitioners continue to face formidable barriers from regulatory procedures that are less onerous to large international firms. The application procedure, for example, requires the applicant to provide proof of a Japanese residence, office lease, financial plan, financial capability and malpractice insurance -- all of which require substantial investments prior to the start of actual business.

Law firms wishing to assist foreign businesses dealing with problems of market access and investment in Japan find that restrictions on hiring bengoshi who can provide advice on Japanese law continue to put them at a disadvantage. Foreign law firms limited to advising clients on the laws of their home jurisdictions are involved primarily in assisting Japanese businesses seeking access to U.S. markets. Some U.S. firms with several years' experience in Tokyo claim that this problem is overstated since they can confer with local bengoshi just as they do in the United States with lawyers in other jurisdictions. Nevertheless, it is this point that transforms the foreign lawyer issue into a trade problem and that is at the center of continuing U.S.-Japan negotiations.

Ongoing Negotiations

In early 1990, after three years of experience under the new law, both governments resumed negotiations to resolve remaining issues. Washington believed that the 1986 legislation was a significant first step but not the final move. The U.S. strategy was to allow experience to dictate the next steps. Five working-level negotiations held in 1990 focused on five points U.S. negotiators wanted revised: (1) the prohibition on partnerships with bengoshi; (2) the prohibition on employing bengoshi; (3) the inability of foreign lawyers to use their firm name as their primary designation; (4) the five-year experience requirement; and (5) restrictions on participation in arbitration proceedings. (See JEI Report No. 2B, January 18, 1991, for detailed discussion of these points.)

USTR officials see the partnership and the employment issues as the most troubling obstacles affecting broader U.S. trade interests. The employment restriction is viewed as benefiting Japanese exports and foreign investment. Permitting closer arrangements between foreign and Japanese lawyers would facilitate foreign business transactions in Japan by providing expertise on domestic law through a firm interested in understanding the needs of foreign clients.

The Japanese side feels that it can be flexible on all the issues except the ones involving employment and partnership. The problem over the arbitration complaint is tied up with the overhaul of the Japanese arbitration system, which will take time to complete. U.S. negotiators point out what they see as an anomaly in that foreigners can act as arbitrators but cannot represent clients in arbitration proceedings.

Negotiators from the Ministries of Foreign Affairs and Justice have said they would like to settle all the outstanding issues in a flexible manner as a way of promoting broader national interests. Nichibenren, however, appears to be resisting further change. It sees the Japanese legal profession as gaining nothing and losing much from flexible solutions: an undesirable change in the composition of legal practice, an emphasis on client-oriented advice, a chipping away at protected preserves and high incomes, a demeaning status from being the employees of foreigners, and the opening of a back door for foreigners to engage in domestic legal advice. Unlike the process in most other areas of Japanese legislation where the responsible ministry drafts laws, bengoshi themselves traditionally have written legislation affecting their legal practice. This independence from government further complicates transpacific negotiations.

Nevertheless, there are signs of change within the Japanese legal community. At least one Tokyo bar association is recommending changes along the lines sought by the United States; articles in legal journals also are advocating similar moves. In addition, negotiators from both sides are seeking technical solutions that would satisfy the main U.S. goals while respecting the core of Nichibenren objections -- for example, the provision for some kind of "joint office." For the moment active, formal negotiations are in abeyance while the Japanese side attempts to arrive at a solution acceptable to domestic players. The time may be ripe now, however, for pushing through a compromise since demand is high, incomes are rising, and no special problems have arisen during the four years in which foreign lawyers have operated under the new law.

Conclusions: Slow Progress and Hidden Agendas

As in so many negotiations between the United States and Japan, progress often appears to be glacial and the results microscopic. Yet over the long run major gains have been achieved. From the time that the American Bar Association first sat down with its Japanese counterpart, 12 years passed before new legislation was forthcoming. The 1986 law, however, did achieve many of the main changes sought by the United States. Nearly 100 foreign lawyers have been licensed to practice in Japan, and more apply every month. Legitimate complaints have been raised on both sides that the approach was mistaken and the outcomes injurious to certain personal and national interests, but by and large there appears to be considerable satisfaction over the results. Still, those results are incomplete; progress continues to be difficult, if not elusive.

Part of the difficulty lies in the hidden agendas of the participants; they actively debate the issues on the table but maneuver directly or indirectly to achieve often hidden and sometimes even subconscious objectives. Many Americans, for example, really do want to change the Japanese legal culture and make what Japanese may regard as the spirit of the law in terms of guidance and understanding more transparent and law-oriented; they also would prefer to see greater emphasis on due process. At the same time many Japanese participants fear a foreign legal invasion and possible dominance in an area where they still are relatively inexperienced. Others are anxious about competitive pressures, whether from foreign or domestic sources; as one economist noted a century ago, the chief benefit from monopoly is a quiet life. In addition, lawyers on both sides prefer higher incomes to lower incomes, although no participant seems willing to be explicit about such a common human motivation. But with persistence, the forces of international supply and demand have become more free, and that has benefited both countries. Ongoing negotiations could enhance these results.

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For further information, contact Arthur J. Alexander.

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The views expressed in this report are those of the author and do not necessarily represent those of the Japan Economic Institute.

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